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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Evelyn C. Gardner,

Petitioner

versus

Panama Railroad Company, a Corporation

Woodrow de Castro
Counsel for Petitioner

SUPREME COURT
OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Evelyn C. Gardner,

Petitioner

versus

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Counsel for Petitioner.

The petition of EVELYN C. GARDNER that a Writ of Certiorari issue out of this Honorable Court to the United States Court of Appeals, Fifth Circuit, in the case of EVELYN C. GARDNER, Appellant, vs. PANAMA RAILROAD COMPANY, Appellee, No. 13,259 in admiralty, alleges that:

Petitioner was injured on December 3, 1947, while a passenger on board the S. S. "Panama", a vessel owned, and operated under the American flag, by the Panama Railroad Company, a corporation, on the high seas en route from New York City to Cristobal, Canal Zone.

On April 9, 1948, petitioner filed, in the United States District Court for the District of the Canal Zone, an action at law number 2807, Civil, for damages against the Panama Railroad Company.

On October 7, 1948, case No. 2807 was dismissed, upon the motion of the defendant, because of the applicability of the Federal Tort Claims Act making the United States, and not the Panama Railroad Company, the proper party defendant.

On November 29th., 1948, petitioner filed an action at law, No. 2930 Civil, in the same Court, for damages arising from the same circumstances as in No. 2807, against the United States.

On October 13, 1949, upon the motion of the United States Attorney for the District of the Canal Zone, case No. 2930 was dismissed on the ground that the Court had been deprived of jurisdiction as a consequence of the enactment by Congress on July 16, 1949, of Public Law 172, 81st. Congress, amending the Federal Tort Claims Act, (Title 28, section 2680 U.S.C.), by adding thereto subparagraph "M", which constitutes an addition to the exemptions from the applicability of the Act, and provides as follows:

"Any claims arising from the activities of the Panama Railroad Company."

On October 19, 1949, petitioner filed, in the same Court, a libel *in personam* in admiralty No. 2097, for damages against the Panama Railroad Company, arising from the same circumstances as formed the basis of cases numbers 2807 and 2930.

The Panama Railroad Company pleaded among others, the defense of laches. A hearing on the issue of laches, only, was had, by agreement of court and counsel, at which hearing the records of cases numbers 2807 and 2930 were introduced into evidence, by stipulation of counsel, for the purpose of the trial of the said issue. On April 6, 1950, the Court sustained the defense of laches and dismissed case No. 2097.

On April 14, 1950, petitioner filed notice of appeal from the order dismissing No. 2097, to the United States Court of Appeals for the Fifth Circuit.

On December 14, 1950, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the judgment of the District Judge dismissing case No. 2097 on the ground of laches. The Mandate of the Court of Appeals was received by the District Court on January 17, 1951.

This petition is based on Rule 38, subparagraph 5 (b) of the Supreme Court of the United States in that the United States Court of Appeals for the Fifth Circuit in the case at bar, has affirmed the rule that where a litigant has a choice of suing at law or in admiralty for the same cause of action, should he choose to sue in admiralty after the analogous period of the running of the statute of limitations, the action will be barred by laches, regardless of diligence or any other factors in his favor.

The aforementioned rule is in conflict with the decision of the United States Court of Appeals for the Second Circuit as enunciated in the case of Lincoln v. Cunard, 221 F 622, in which case an action at law to recover for personal injuries inflicted by a steamship was brought, within the time prescrib-

ed by the statute of the state, against the owner in a federal court in New York. From various causes, not chargeable to the fault of the plaintiff, the cause was delayed for more than two years, when it was dismissed for want of jurisdiction without prejudice, it having been learned that both parties were subjects of Great Britain. A new action in admiralty was commenced at once. The Court held that the plea of laches would not defeat the suit.

Respectfully submitted,

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SUPREME COURT
OF THE
UNITED STATES

PETITIONER'S BRIEF

Evelyn C. Gardner,

Petitioner

versus

Panama Railroad Company, a Corporation

INDEX

Table of cases, statutes, and other source material referred to ..... P 9

1. Grounds for invocation of jurisdiction of the Supreme Court 10

2. Statement of the case 10

3. Assignment of errors 12

4. Argument 12

TABLE OF CASES CITED

Holmberg v. Armbrecht, 327 U.S. 392, 66 S Ct. 582. .... p. 12.
John M. Young v. The Steamboat *"Key City"*, 81 U.S. 896. .... p. 12.
Lincoln v. Cunard S.S. Co. 221 F. 622. .... p 10 — 13.
McGrath v. Panama Railroad Company 298 F 303. .... p. 13.

STATUTES CITED

Federal Tort Claims Act — August 2, 1946 (28 U.S. Code, Sections 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2412, 2671, 2680). .... p. 10.

Public Law 172, 81st Congress; an Act to amend section 2680 of Title 28, United States Code, approved July 16, 1949, 28 U.S. Code Section 2680 (m). .... p. 11, 14.

OTHER SOURCE MATERIAL

United States Code Congressional Service, No. 6, for 1949 — 81st Congress, 1st Session, June 24 to August 10, Chapter 240-416. .... p. 13.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. GROUNDS FOR INVOCATION OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES.

The jurisdiction of the Honorable Supreme Court is invoked for a reason in accord with that set forth in Rule 38, paragraph 5, subparagraph b, of the Supreme Court.

The United States Court of Appeals for the Fifth Circuit, in the case at bar, has, in effect, held that where there is a choice of remedy for the same cause of action between an action at law and a suit in admiralty, an assertion of that choice in the form of the institution of a suit in admiralty after the expiration of a time analogous to the running of the local statute of limitations will defeat the projected action because of laches, regardless of diligence on the part of the moving party. The rule aforedescribed is in conflict with that set forth in the case of Lincoln v. Cunard Steamship Company, 221 F 622, in which it was held that lapse of time alone does not constitute laches, regardless of an analogous statute of limitations, or, by implication, of the initial existence of a choice to sue at law or in admiralty.

2. STATEMENT OF THE CASE:

Evelyn C. Gardner, the petitioner herein, was injured on December 3, 1947, while a passenger on board the S.S. *"Panama"*, a vessel owned and operated under the American flag by the Panama Railroad Company, a corporation, on the high seas en route from New York City to Cristobal, Canal Zone.

On April 9, 1948 petitioner filed in the United States District Court for the District of the Canal Zone, an action at law, number 2807, Civil, for damages against the Panama Railroad Company, (p 26 of the record).

On October 7, 1948, case number 2807 was dismissed, upon the motion of the defendant, because of the applicability of the Federal Tort Claims Act, (28 U.S. Code Sections 1291,

1346, 1402, 1504, 2110, 2401, 2402, 2412, 2671, 2680), making the United States, and not the Panama Railroad Company, the proper party defendant.

On November 29th, 1948, petitioner filed an action at law, number 2930, civil, (p 26 of the record) in the same Court, for damages arising from the same circumstances as in number 2807, against the United States.

On October 13th, 1949, upon the motion of the United States Attorney for the District of the Canal Zone, case number 2930 was dismissed on the ground that the Court had been deprived of jurisdiction as a consequence of the enactment by Congress on July 16, 1949, of Public Law 172, 81st Congress, amending the Federal Tort Claims Act, by adding thereto subparagraph "M", which constitutues an addition to the exemptions from the applicability of the Act, and provides as follows:

"Any claims arising from the activities of the Panama Railroad Company." (Page 19 of the record).

On October 19th., 1949, petitioner filed, in the same Court, a libel *in personam* in admiralty, number 2097, for damages against the Panama Railroad Company (Page 1 of the record) arising from the same circumstances as formed the basis of cases numbers 2807 and 2930.

The Panama Railroad Company pleaded among others, the defense of laches (page 24 of the record). A hearing on the issue of laches, only, was had, by agreement of Court and counsel, (page 26 of the record), at which hearing the records of cases numbers 2807 and 2930 were introduced into evidence by stipulation of counsel, (page 26 of the record), for the purpose of the trial of the said issue. On April 6th, 1950, the District Court sustained the defense of laches and dismissed case number 2097, (p 34 of the record).

On April 14th, 1950, petitioner filed notice of appeal from the order dismissing case number 2097, (p 35 of the record), to the United States Court of Appeals for the Fifth Circuit.

On December 14th, 1950, the United States Court of Appeals for the Fifth Circuit rendered its opinion affirming the judgment of the District Court dismissing case number 2097 on the ground of laches. The Mandate of the Court of Appeals was received by the District Court on January 17th, 1951. A certified copy of the said opinion and Mandate of the Court of Appeals are included as a part of the record hereof.

3. ASSIGNMENT OF ERRORS: The United States Court of Appeals for the Fifth Circuit erred in sustaining the judgment of the United States District Court for the District of the Canal Zone dismissing the libel as a matter of law on the ground of laches.

4. ARGUMENT:

Laches as a matter of law is composed of two elements, the lapse of time, and diligence, or the lack of it, on the part of the moving party: Holmberg v. Armbrecht, 327 U.S. 392, 66 S. Ct. 582.

This Honorable Court held, in the case of John M. Young vs. The Steamboat *"Key City"*, 81 U.S. 896, decided in 1872, that Courts of Admiralty are not bound, in determining whether or not a litigant has been guilty of laches in the institution of an action, by the local statute of limitations, but the delay which will defeat such a suit must in every case depend upon the peculiar equitable circumstances of that case.

In the case at bar the moving party brought not one, but two, actions against, in each case, respectively, the proper party defendant on the same cause of action. Petitioner could in no way have acted more diligently.

During the pendency of the second action instituted by petitioner, Congress, on July 16th., 1949, enacted Public Law 172, 81st Congress, which in effect legislated Petitioner out of Court. Within six days of the order dismissing case number 2930, civil, Petitioner filed the suit at bar in admiralty

seeking redress for the same wrong as that alleged in case number 2930. Petitioner was as diligent as was possible under the circumstances.

The legislative history of Public Law 172, as contained in pages 1753 - 1758 of the United States Code Congressional Service, number 6, for 1949 — 18st Congress, 1st Session, June 24 to August 10th., Chapter 240-416, shows that the intention of Congress in enacting the said Law was certainly not to restrict, but rather to improve the position of prospective litigants. It is grossly inequitable that the purely fortuitous injustice of the effect of the passage of Law 172 should be given will and purpose by the courts.

Within the time prescribed by the statute of the state, an action at law to recover for personal injuries inflicted by a steamship was brought against the owner in a federal court in New York. From various causes not chargeable to the fault of the plaintiff, the cause was delayed for more than two years, when it was dismissed for want of jurisdiction without prejudice, it having been learned that both parties were subjects of Great Britain. A new action in admiralty was commenced at once, and the United States Circuit Court of Appeals, Second Circuit held, in the case of Lincoln v. Cunard S.S. Co., 221 F 622, that libelant could not be charged with laches to defeat the suit.

In the very case relied upon as the controlling precedent in the case at bar by both the trial Court and the Court of Appeals, the case of McGrath v. Panama Railroad Company, 298 F 303, the Court of Appeals for the Fifth Circuit did not go so far as to hold that where there was a choice to sue at law or in admiralty on the same cause of action, and the choice was asserted by the instituting of a suit in admiralty after the lapse of a time analogous to the local statute of limitations, the suit would be barred by laches. The facts in the McGrath case differed from those in the case at bar in that, most significantly, the moving party had shown no diligence prior to filing the suit in admiralty.

The legislative history of Public Law 172, show also an intention contrary to the assertion made by the Panama Railroad Company in one of the defenses pleaded by it to the libel in the case at bar, namely; that no cause of action ever arose against the Panama Railroad Company since on December 3, 1947, the Federal Tort Claims Act was applicable to the activities of the Company, and a cause of action due to its activities could arise only against the United States. Such a contention on the part of the Panama Railroad Company would, if sustained, deprive seamen, and others, who were injured as a result of the activities of the Panama Railroad Company after the enactment of the Federal Tort Claims Act, or before the enactment of the amendment thereto contained in Public Law 172, of a remedy.

Respectfully submitted,

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